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No. 07-116

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STEPHEN S. ADAMS, ET AL.,
Petitioners,
v.
UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT

A. The Conflict Is Real, Substantial, and Persistent 1

B. The Federal Circuit's Construction Conflicts With That of the Government, As Law Enforcer 4

C. The Federal Circuit's Construction, Even As Reformulated, Cannot Be Reconciled With This Court's 5

D. The Issue, Important and Squarely Presented Here, Warrants This Court's Review 9

E. The Court Should Grant Review on the Custom or Practice Issue, As Well 10

Conclusion 10

TABLE OF AUTHORITIES

CASES

Aiken v. *City of Memphis*,
190 F.3d 753 (6th Cir. 1999) 3

Anderson v. *Mount Clemens Pottery Co.*,
328 U.S. 680 (1946) 8

Baker v. *Barnard Const. Co., Inc.*,
146 F.3d 1214 (10th Cir. 1998) 2

Bobo v. *United States*,
136 F.3d 1465 (Fed. Cir. 1998) 1, 5, 7, 9

Dole v. *Flint Engineering and Const. Co.*,
914 F.2d 262 (9th Cir. 1990) (table) 2

Dunlop v. *City Electric, Inc.*,
527 F.2d 394 (5th Cir. 1976) 2, 4, 8

Graham v. *City of Chicago*,
828 F. Supp. 576 (N.D. Ill.1993) 3

IBP, Inc. v. *Alvarez*,
126 S. Ct. 514 (2005) 1, 5, 6, 7

Karr v. *City of Beaumont*,
950 F. Supp. 1317 (E.D. Tex. 1997) 3

Long Island Care at Home, Ltd. v. *Coke*,
127 S. Ct. 2339 (2007) 4

Reich v. *New York City Trans. Auth.*,
45 F. 3d 646 (2d Cir. 1995) 4, 7, 9

Schmidt v. *Dept. of the Interior,*
153 F.3d 1348 (Fed. Cir. 1998), ... 5

Steiner v. *Mitchell,*
350 U.S. 247 (1956) 5, 6, 7

Torres v. *Oakland Scavenger Co.,*
487 U.S. 312 (1988) 9

United Transp. Union Local 1745 v. *Albuquerque,*
178 F.3d 1109 (10th Cir.1999) 3, 9

STATUTES AND COURT RULES

29 U.S.C. § 254(a). ..... *passim*

29 U.S.C. § 254(b). 10

31 U.S.C. § 1344(a)(2)(B) 7

Fed. R. App. P. 3(c) 9, 10

REGULATIONS & ADMINISTRATIVE MATERIALS

26 C.F.R. § 1.274-5T(k)(3) 8

29 C.F.R. § 553.221(a) 3

29 C.F.R. § 785.41 ..... 3, 8

U.S. Civil Service Commission,
Federal Personnel System Manual (FPM)
Letter No. 551-10 (April 30, 1976) 5, 8, 10

U.S. Department of Labor, Wage and
Hour Div., Field Operations Handbook 4

U.S. Department of Labor, Wage and
Hour Div., Wage-Hour Op. Letter
No. 454 (Feb. 9, 1978) 4

Br. Amicus Curiae of the U.S., *IBP, Inc.* v. *Alvarez*,
No. 03-1238 (2005) 6

Plaintiff's Memorandum in Opposition
to Summary Judgment, *Chao* v. *Tyson Foods*,
2:02-cv-0174-VEH (N.D. Ala.) (filed Aug. 27, 2007) .. 4

OTHER MATERIALS

Transcript of Oral Argument, *Adams, et al.* v.
United States, Nos 06-5040 & 06-5041
(Fed. Cir. Nov. 8, 2006) 8

OPM, *Hours of Work for Travel*
http://www.opm.gov/oca/worksch/html/travel.asp
(visited Dec. 8, 2007) 5

The Federal Circuit, in this case and *Bobo*, has interpreted the FLSA to mean that employer-required driving "done for the employer's benefit, under the employer's rules, is noncompensable," App. 9a., unless the employee "perform[s] additional legally cognizable work while driving," *id.* 5a.

The Petition showed (1) that this construction, while consistent with the Sixth Circuit's, conflicts squarely with decisions of other federal and State courts, with the Labor Department's and OPM's FLSA and Portal Act regulations, and with this Court's decision in *Alvarez*; and (2) that review is especially warranted on account of the issue's broad practical importance and because the Federal Circuit's restrictive rule contravenes Congress's intent that the FLSA rights of federal employees be consistent with those of other workers.

Nothing in the Opposition detracts from any of this. The Government's brief and perfunctory denial of a circuit split – consisting largely of unelaborated assertions that conflicting decisions are in fact "consistent" and reminders that factual peculiarities can explain case outcomes – falls drastically short here, where courts' stated legal standards are *facially* in conflict; cases presenting *identical* facts yield opposite results; and a factually *stronger* FLSA claim fares worse under the Federal Circuit rule than would a weaker one elsewhere.

Nor does the Opposition's effort to cast the Federal Circuit decision as consistent with *Alvarez* diminish the need for review. The "Federal Circuit rule" the Opposition defends bears only a modest resemblance to the one that court actually applies – and the refurbished version is still contrary to *Alvarez* and to the longstanding interpretations of the Secretary of Labor and OPM. And as demonstrated below, the Opposition's reasons supposedly "further" militating against certiorari fail to withstand scrutiny.

A. The Conflict Is Real, Substantial, and Persistent

The Petition (at 13-20) identified decisions of no fewer than 11 different courts, each holding that driving to or from work is compensable when that activity is "integral and

indispensable," without any inquiry whether "additional legally cognizable work [was performed] while driving." Pet. App.9a.

The Opposition largely takes a "nothing to see here, move along" approach to this potent evidence of decisional conflict – confining its mention of the inconvenient cases to footnotes, omitting a number altogether, and asserting, without further explanation, that another, "is consistent with the outcome in this case," Opp. 15 n.9 (citing *Dole* v. *Flint Eng'g*). Noting that this case arises in the "specific context" of Petitioners' federal law enforcement employment, Opp. 18, it asks the Court to assume that divergent results reflect courts' "decid[ing cases] upon [their] peculiar facts." *id.* 15 (citation omitted).

1. These assurances notwithstanding, the difference between the competing legal standards could hardly be more obvious and sharp. While the Federal Circuit treats required driving "done for the employer's benefit, under the employer's rules" as noncompensable (absent further duties), the Fifth Circuit has held that Section 4(a) *only* exempts activities undertaken "for [employees'] own convenience, [and neither] * * * required by the employer [nor] * * * necessary for the performance of their duties," *Dunlop*, 527 F.2d, 394, 398 (5th Cir. 1976). And the Tenth Circuit, in *Baker*, held that whether time spent driving a vehicle home is a "principal activity" or noncompensable "[n]ormal travel" depends whether:

> the [employees] were truly free to go where they wanted at the end of the work day and to use whatever method of transportation they chose * * * *; whether [they] could have left the [vehicles] at the work site * * *, or whether [they] were required, by policy or practical reality, to transport the[m] from the work site each day * * * *

146 F.3d at 1219. That decision did not view what the Federal Circuit makes dispositive – "additional work" during the drive – as even *relevant* to the FLSA analysis, and in this case, the answers to the Tenth Circuit's central questions are beyond dispute: petitioners were *required* to transport the specially-equipped, employer-owned vehicles "from work each day."

2. This is just the beginning of the problems for the Government's "peculiar facts" claim. That hypothesis cannot possibly explain why courts applying Fifth and Seventh Circuit law reach results directly opposite to those of the Sixth and Federal Circuits *in cases raising essentially identical facts* – police canine handlers required to transport dogs between home and work each day. Compare *Graham* v. *Chicago*, 828 F. Supp. 576 (N.D. Ill.1993); *Karr* v. *Beaumont*, 950 F. Supp. 1317 (E.D. Tex. 1997) with *Aiken*, 190 F.3d 753 (6th Cir. 1999).

3. Worse still, circumstances the *Government* suggests are legally relevant make Petitioners' claim of "principal activity," rejected at the threshold under the Federal Circuit rule, far *stronger* than ones that succeeded in other courts. This case involves driving – rather than merely "riding" to work – see 29 C.F.R. § 785.41, compare *UTU*; the driving is required not merely as a matter of "practical reality," *Baker*, 146 F.3d at 1219, but as a binding condition of Petitioners' employment. In Petitioners' case (unlike *Flint*), transporting the vehicles home is specifically required so they could perform further job duties – emergency response in the law enforcement vehicle – there. And Petitioners, unlike the prevailing employees in *Flint* or *UTU*, have job responsibilities during the drive and are barred from making personal stops or carrying passengers.

4. Nor can the conflict be explained by the fact that this case, but not others, arises in the "context" (Opp. 15) of law enforcement. *Graham* and *Karr* also arose in that context, and nothing in Section 4(a)'s text supports any such distinction. Indeed, the controlling regulations expressly confirm the opposite: while special rules apply to meals and sleep time for certain police officers, "[t]he general rules on compensable hours of work * * * set forth in 29 CFR Part 785 [are] * * * applicable to [those] employees." 29 C.F.R. § 553.221(a).[1]

[1]The Government's effort (Opp. 4-7) to depict the decision as resting on some supposed evidentiary failing is baseless: the Court of Appeals, correctly, treated as "undisputed," App. 2a, that Petitioners were required to drive between home and work in Government-owned vehicles, to enable them to respond to emergency calls at any time; prohibited from using those

B. The Federal Circuit's Construction Conflicts With That of the Government, As Law Enforcer

As the Petition explained, the interpretation of Section 4 adopted by the Federal Circuit and now embraced in the Opposition is in sharp opposition to the Government's construction as interpreter and enforcer of the FLSA in the private and nonfederal sectors. The Opposition (p. 16) obliquely acknowledges "tension," but insists that it is neither specific nor important enough to warrant this Court's review.

1. What the Government calls "tension" is fairly described as fundamental disagreement: in a legal memorandum submitted after the filing of the Petition here, the Secretary of Labor espoused the view that Section 4(a) "'exclude[s] from FLSA coverage *only* those activities * * * [in which][*n*]*o* benefit * * * inure[s] to the [employer],'" Mem. in Opp. to Summ. Judg., *Chao* v. *Tyson Foods*, 2:02-cv-0174-VEH (N.D. Ala.) (Aug. 27, 2007) at 30 (quoting *Dunlop*; emphasis added by Government), and that, rather than being "highly contextual" (Opp. 15), the "integral and indispensable test is a general rule * * * that can apply in any environment," *id.* at 22.

2. Nor has the Department only spoken in "materially [dis]similar" circumstances (Opp. 16). It has long construed the FLSA and Portal Act to mean that "if the employer requires or directs an employee to drive an employer's vehicle to a job location, such travel time would constitute hours worked," see Ltr. No. 454 (Feb. 9, 1978), and what is "material" under F.O.H. § 31d00(a)(5), defining when "time spent in driving would be hours worked," is not that the vehicle is an ambulance (Opp. 16 n.9), but rather that the "employee is required to [drive it] home in order to respond to calls immediately." *Reich* was an enforcement action based on the Department's construction of its FLSA and Portal Act regulations, see *L.I. Care at Home* v. *Coke*, 127 S. Ct. 2339 (2007), as was almost

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vehicles to run personal errands; required to monitor their radios during their commutes, and required to transport government-issued weapons and other law-enforcement equipment.

every case holding driving a compensable principal activity.

3. As the Petition (p. 21) explained, this conflict *is* important – not because it is unseemly for the Government to advance different constructions as law enforcer and employer, but because Congress expressly intended that federal employees enjoy the same FLSA protections as their counterparts in private and local government employment.

4. For this same reason, the Government's effort (Opp. 16) to disparage Letter 551-10 and elevate the "guidance" appearing on an OPM webpage is beside the point: even if the website represented the considered judgment of that agency, the law is clear that the Labor Department's (conflicting) construction of the FLSA would control. That said, Letter 551-10, which specifically addresses the circumstances of this case, is not, as the Government implies, some informal expression of opinion plucked from an agency file drawer: it announced the government-wide rule, adopted almost contemporaneously with the FLSA's extension and in place for decades, including all times relevant to this case. See *Schmidt* v. *DOI*, 153 F.3d 1348, 1353 n.4 (Fed. Cir. 1998) (relying on FPM in post-"sunset" case). By contrast, the guidance, which appeared years after the activities here at issue, does not purport to speak to these circumstances, let alone do so retroactively; it is, in fact, little more than recognition of *Bobo* as the law of the Federal Circuit.

C. The Federal Circuit's Construction, Even As Reformulated, Cannot Be Reconciled With This Court's

Given *Alvarez*'s teaching that "[t]here is no plausible argument that ["principal activities"] * * * mean[s] something different" in Sections 4(a)(1) and (2), 546 U.S. at 34, the Government labors strenuously to acquit the Federal Circuit of having adopted a "two tiered" construction, explaining that the *Bobo* opinion, no less than those of the Fifth and Tenth Circuits, "[e]xpressly invoked this Court's ruling in *Steiner*," Opp. 10, and asserting that "nothing in the court of appeals' decision [here] suggests" the court applies a special rule for driving, as against other activities. *Id*

The latter assertion pushes the limits of acceptable hyperbole; the opinion began by identifying a Portal Act rule "specific[] to vehicular travel," App. 5a, described as framing the legally controlling "question in this appeal." And if "invoking" the appropriate decision of this Court established an opinion's correctness, the certiorari docket would quickly run dry: the relevant question is whether the decision's *understanding* of *Steiner* is correct.

1. The centerpiece of the Government's claim of "consistency" is that, rather than embodying a dual standard, the Federal Circuit rule adapts the unitary Section 4(a) rule to the "specific context of work-to-home commuting, which does not normally primarily benefit the employer." Opp. 13. But so restated, the rule is still irreconcilable with *Steiner* and *Alvarez*. Both cases concerned an activity – changing clothes – that "normally does not primarily benefit the employer." The whole thrust of the Court's decisions was that such activities are "principal" – and therefore beyond the reach of Section 4(a) – when, in fact, they are integral and indispensable. See U.S. Amicus Br., No. 03-1328, at 29 ("Congress expressly contemplated that donning gear could be a compensable principal activity for some employees and not others"). *Alvarez* held that "any activity that is 'integral and indispensable' * * * is itself a 'principal activity' 546 U.S. at 37. That the activity in question is one that is not always compensable (or "normally" might not be) is a reason for performing the *Steiner* analysis – not for altering it.

2. The Government's attempt to tether the Federal Circuit rule to the recognition that not every "necessary" activity is a "principal" one, Opp. 7 (quoting 546 U.S. at 40), misunderstands both *Alvarez* and the claim here. The limitation recognized there explains why *ordinary* home-to-work driving is not compensable work – *pace* Woody Allen, "showing up" may be a precondition for performing work, but in the "normal commute" situation, the employer is indifferent as to how an employee arrives – or where he goes (or how he travels) at the

end of the working day. Here, because driving the employer's vehicles is "essential for the safe and efficient performance of [Petitioners'] * * * law enforcement duties," 31 U.S.C. § 1344(a)(2)(B), it is a mandatory condition of employment.

This obvious difference was not beyond the Court's contemplation in *Alvarez*. The very passage the Government cites – in which the Court held that merely waiting to perform a principal activity does not satisfy the "integral and indispensable" standard – went on to explain that the "analysis would be different if [the employer] *required* its employees to arrive at a particular time in order to begin waiting." 546 U.S. at 40 n.8 (emphasis added). That, in a nutshell, is this case.

3. Nor is there merit to the claim (Opp. 11-12) that the Federal Circuit rule may be read *as if* it had applied the "integral and indispensable" test to Petitioners' driving – and concluded, as a matter of law, that the "primary benefit" to the employee outweighed other, countervailing "factors," *e.g.*, that Petitioners had no "choice * * * in the matter."

One scours the decision below (and *Bobo*) in vain for any indication the court performed the analysis or made the determinations the Government ascribes to it.[2] But this *post hoc* rationale is riddled with problems in any event. First, "predominant benefit" is a strange basis to distinguish the activity here from that in *Steiner* and *Alvarez*: where donning gear protected the "health and hygiene," 350 U.S. at 249, of the employees, the activity here has been deemed by Congress "essential" to the employer's purposes. Indeed, *Steiner* plainly attached weight to the fact that the activity was required, and a number of courts (and the Secretary of Labor) take the position

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[2]In fact, *Reich*, while *identifying* these factors as relevant, did not actually undertake a balancing, either – and, contrary to the Federal Circuit's assumption, that case and *Bobo* were critically *dis*similar. The canine handlers in *Reich* were *not* required to drive employer vehicles, See 45 F.3d at 648 n.2. (nor, apparently, were they barred from stopping or carrying passengers). Thus, any balancing in that case would have entailed weighing the employer benefit *against* the fact the employees had "choice * * * in the matter" – whereas here, and in *Bobo*, all factors point toward compensation.

that, in such circumstances, *any* benefit to the employer will place the activity outside the 4(a) exception, see *Dunlop*.

Under any circumstances, the claim that the driving here "primarily benefits the employee because it accommodates the employee's choice of where to live," Opp. 8, would hardly be self-evident. In addition to the Government's practice of paying compensation under Letter 551-10, the IRS has long recognized driving of a law enforcement vehicle under these circumstances as an exception to its general rule that driving a work vehicle home is a taxable benefit, see 26 C.F.R. § 1.274-5T(k)(3)-(7); and it by no means natural to describe the activity at issue as an "*accommodation*" of employees – it involves a mandate, one that requires performance of labor, *i.e.*, driving, see 29 C.F.R. § 785.41, of an employee who would rather ride public transportation or in a spouse's car and interferes with the benefits of normal commuting, such as running errands or dropping children off at school. Indeed, there is no need to rest on inferences here; at oral argument in the Federal Circuit, the United States, pressed on the benefit question, answered:

> It may benefit the employee in a lot of ways, but we don't dispute that the reason it's required is because the government gets enough of a benefit from it that the government chooses to require it.

Tr. Oral Arg. (Nov. 8, 2006) at 35.[3]

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[3]The Opposition also ventures a defense of the Federal Circuit's reliance on the "de minimis" rule, insisting that while this Court's *Anderson* decision concerned negligible amounts *of time*, it in "no way preclude[d]," Opp. 12, lower courts from formulating different rules by analogy. To be sure, the Court does not control the analogies to which its decisions might give rise, but the Federal Circuit did not purport to be reasoning by analogy; it claimed to be applying precedent in the *Anderson* line. But treated as an analogy, it is an entirely inapt one: the subject of the *Anderson* rule, amounts of time an activity requires, are objective and quantifiable, and the test applies in an area where the law is silent. And *Anderson* rested on the rule that the law (and workplace reality) are not concerned with "trifles." It cannot plausibly be claimed that an employee, previously free to structure his pre- and post-shift time as he pleased, would meet an order to drive a work vehicle back and forth each day, without making stops or carrying

D. The Issue, Important and Squarely Presented Here, Warrants This Court's Review

1. There is no merit to the odd claim that, notwithstanding the importance of the question presented "for employees outside federal criminal law enforcement," Opp. 18, review may be denied here, on account of its "limited prospective importance" to Petitioners, whose positions are no longer covered by FLSA's overtime provision. The "federal law enforcement" context played no role in the *Bobo* decision, which explicitly sought to align Circuit law with its (mistaken) understanding of *Reich*, see n.2, *supra*, and this Court's longstanding explanation of its certiorari jurisdiction does not support denying review of a case raising a conflict over a significant question of federal statutory law because the petitioning litigants might not have *future* claims. Such a rule would be especially perverse here, where the case is of undeniable *present* importance to thousands of individual Petitioners, who have pursued this litigation for nearly two decades – and where the issue has immediate, *prospective* significance for thousands of other individuals with claims currently pending at the trial court level, see Pet. 8 n.4.

2. Nor does F.R.A.P. 3(c) (Opp. 19) in any way counsel against review. Before the Court of Appeals, the Government did not press a claim, as it now does, based on professed inability to figure out which subset of the 14,000 plaintiffs were appealing. It argued, citing *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), that the notices of appeal did not satisfy Rule 3(c), because they did not bear the names of every appealing plaintiff – an argument the Federal Circuit rejected, App. 3a, noting, as the Government had neglected to, that *Torres* had been superseded by a 1993 amendment, expressly approving of designations such as "the plaintiffs A, B, et al.," and "all defendants except X."

Rather than quit while behind, the Government advances a

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passengers, with the same equanimity as a request to undertake, on an occasional basis, some activity requiring a minute or two of his time.

different, but equally baseless Rule 3(c) claim – that the (amended) Rule's practical notice requirement supplies "prudential" grounds for denying review. As the Government necessarily concedes, the doubts it tries to sow would not, if they had substance, go to this Court's (or the appellate court's) power to decide the issue – and they would not, for reasons just explained, alter the importance of the case for the many employees and employers whose lawsuits and work arrangements the question affects. But the Government's claim – that notices of appeal on behalf of "Steven S. Adams and 6,479 additional plaintiffs" and "James J. Aaron and 129 additional plaintiffs," left the courts below guessing as to who among the plaintiffs was appealing – is fatuous. It was manifestly clear that those numbers referred to the individuals who were parties to the settlements, see Opp. 4, which describe in detail which plaintiffs benefitted (and were bound) thereby.

E. The Court Should Grant Review on the Custom or Practice Issue, As Well

As to Section 4(b), the construction below was, despite the Government's *ipse dixit* claim of correctness (Opp. 17), utterly contrary to the plain meaning and purpose of that provision. See Pet. 28-30. The decision did not "conclude[]" that those compensated according to Letter 551-10 "were not similarly situated to petitioners," Opp. 17; it pronounced "*hypothetical*" the employer's – undeniably real – practice of treating required law enforcement driving as compensable work. Nor would such a conclusion have been defensible: Petitioners were *identically* situated to those customarily paid, in those respects the employer deemed relevant: (1) they were covered by the FLSA, and (2) they drove work vehicles home, per employer requirements, for law enforcement response purposes. Whether or not the Section 4(b) issue recurs enough to warrant review on its own (Opp. 18) matters not, as it is presented here in a case that raises other, undeniably cert-worthy issues.

Conclusion

The petition should be granted.

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